To be argued by
JAMES B. DONOVAN

No. [redacted] -2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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September 21, 1959.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 263

RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus,

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v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF OF PETITIONER.

On October 13, 1958 this Court granted our petition for a writ of certiorari, with respect to the following questions:

1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution of espionage?

On February 25, 1959 the case was orally argued. On March 23, 1959 the Court ordered re-argument and requested that counsel discuss in their further briefs, in addition to other issues, certain questions. These are set forth below, with the answers of petitioner thereto:

Question 1. "Whether under the laws and Constitution of the United States:

(a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued;

(b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody; and

(c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham"?

Answer 1. Under the laws and Constitution of the United States:

(a) the administrative warrant was not validly issued in that it fails to meet the requirements of the Fourth Amendment: the purpose stated in the warrant and the accompanying "Order to Show Cause and Notice of Hearing" (none "supported by Oath or affirmation") was to take petitioner into custody for a hearing before I. N. S. in New York City on July 1, 1957, with respect to whether petitioner as a suspected alien should be deported from the United States; actually the Department of Justice, pursuing a counter-espionage objective, used the administrative warrant as a subterfuge in order secretly to search, seize and conceal in Texas a suspected espionage agent and all his effects;

(b) such administrative warrant, so issued for such purposes, did not constitute a valid basis for arresting petitioner or taking him into custody; and

(c) such administrative warrant, so issued for such purposes, did not furnish a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

Question 2. "Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham were valid under the laws and Constitution of the United States"?

Answer 2. No.

Question 3. "Whether on the record before us the issues involved in Questions '1(a)', '1(b)' and '2' are properly before the Court"?

Answer 3. Yes.

Supplemental Fact.

Upon oral argument of the case, this Court evinced interest in whether (a) the I. N. S. on its own initiative and as a customary procedure, used an administrative warrant to seize Abel as an alien illegally in the United States, or (b) the I. N. S. so acted at the request of an F. B. I. interested in Abel's secret detention, for its own counter-intelligence purposes, prior to any public disclosure or indictment.

Counsel for petitioner pointed out that General Swing, the Director of I. N. S., publicly stated in a newspaper interview that "Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it" (76). This statement was never denied in the District Court by the Government, although it was given full opportunity to do so (75). Further, the truth of this assertion was borne out by the

testimony of all F. B. I. and I. N. S. officers who participated in the actual search and seizure (Our Principal Brief, pp. 5, 6).

The Government has weaved and ducked upon this question, hopefully relying on the Court of Appeals' characterization of General Swing's newspaper statement as "multiple hearsay" (852). It has been our position that the point is not of determinative importance, since our contentions are based on the course of action pursued by the Department of Justice, of which I. N. S. and the F. B. I. are component parts (Our Brief, pp. 9, 14, 15). However, it should be reported to the Court that any doubts in the matter have been conclusively resolved in favor of petitioner's contention.

In "Masters of Deceit, The Story of Communism in America and How to Fight It" (Henry Holt and Company, New York, 1958) the Abel case is discussed by J. Edgar Hoover, Director of the F. B. I., who makes the following statements of fact (pp. 298, 299):

> "Such was the case of Colonel Rudolf Ivanovich Abel, of Soviet intelligence, who was arrested by the Immigration and Naturalization Service in June, 1957, *at the request of the F. B. I., after we had identified him as a concealed agent. After his indictment in August, 1957, on espionage charges, information was made public concerning him which the F. B. I. could not previously disclose*'" (italics supplied).

This authoritative declaration by the Director of the F. B. I. surely will not be disputed by the Department of Justice. The prior public statement of the Director of I. N. S. thus has been corroborated by the highest possible source, in a manner of which the Court may take judicial notice.

POINT I.

Petitioner's Answers to the Court's questions for reargument, are supported in all respects by the Briefs and Arguments previously submitted to the Court.

In this case a simple precision—both in fact and in law—advances the contentions of petitioner, while confusion bred of verbosity can favor upholding Abel's conviction on emotional grounds which may be understandable but are quite irreconcilable with express provisions of the Constitution. For this reason among others, we shall not reiterate at length the arguments previously set before the court.

A.

Our answer to the Court's first question, concerning the validity of the administrative process employed in this case, is supported by the full text of our Principal Brief. The procedural devices employed by the Government to seize and subsequently convict petitioner are repugnant to the letter and the spirit of the Constitution, as well as our heritage of freedom.

B.

Our answer to the Court's second question, concerning the validity of the Government's acts if such had been undertaken without any pretense of process, is also supported by our Principal Brief. The Court's attention is directed to Appendix B therein (pp. 38-40), entitled "Evidence of Espionage Obtained by the Department of Justice Prior to Abel's Detention for Deportation on June 21, 1957." In view of the Government's prior possession of such a plethora of evidence, there can be no justification of its failure to conform to the express requirements of the

Fourth Amendment and due process of law. Our Principal Brief, pp. 18-25; Notes 34 N. Y. U. Law Review 159 and 34 N. Y. U. Law Review 619 (1959). See also the reasoning in all opinions in Baltimore Health Inspectors Case, 359 U. S. 360 (1959).

C.

Our answer to the Court's third question, as to whether certain of the "search and seizure" issues are properly before the Court, is supported by the Transcript of Record, our Petition for Certiorari and our briefs and oral argument in this Court.

If any aspect of the "search and seizure" problem in this case is not before the Court, it would be difficult for counsel to understand how else it could have been accomplished. The issues were not presented first to the trial court upon the cursory argument of the admissibility of an item of evidence; they were not even first presented by an ordinary pre-trial motion under Rule 41-E for the suppression of evidence (281). Because of a decision by the Court of Appeals for the Second Circuit [*U. S.* v. *Klapholz*, 230 F. 2d 494 (1956)] indicating such to be the correct procedure, counsel for petitioner first asserted these contentions in an independent civil proceeding for the return of property, brought in the District wherein it was seized. The attention of the Court is respectfully directed to the factual and legal arguments supporting and opposing that original proceeding in the Southern District of New York (20-78). They are virtually identical in substance with the arguments now made by both counsel before this Court. Following this procedure, upon a pre-trial motion under Rule 41-E a lengthy pre-trial hearing with examination and cross-examination of witnesses was held in the Eastern District of New York (79-282). Written opinions on the subject were delivered by the District Court (239-246) and

the Circuit Court (848-856). The issues were explicitly set forth in the Petition for Certiorari pages 4-7, 10, 13-16, Appendix "D").

Any complaint by the Government of these issues being newly introduced, can only be understood as a reluctance to face them. In the District Court the Circuit Court and in this Court upon our Petition for Certiorari, the "search and seizure" question was one of various legal points advanced by the defense. It was not until this Court granted our petition upon the single ground of "search and seizure" that all efforts of counsel (and space in briefs) were devoted to an exhaustive presentation of every argument and precedent which could aid the Court in a proper determination. Oral argument and the questioning of the Court further probed the issues.

The more complete examination in an appellate court, of the legal issues raised below and their implications, does not affect whether these issues are properly before the Court. The Court should ignore any such whimpers by the Government in this case unless it can be shown that any question now asked by the Court in its Order for Reargument, is not germane to a proper determination of the issues raised in a pre-trial proceeding which set forth the pertinent facts and asked the District Court to grant an order (21):

> "Directing the Respondent, United States of America, to return and to suppress for use as evidence any and all property seized on the 21st day of June, 1957 in Room 839, Hotel Latham, 4 East 28th Street, New York, New York upon the ground that said property was illegally seized without warrant, contrary to the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper."

Conclusion.

The judgment below must be reversed, and the case remanded for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

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